

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

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	)	
DEBORAH J. THOMAS,	)	DOCKET NUMBER
Appellant,	)	PH-0752-97-0174-I-1
	)	
v.	)	
	)	
DEPARTMENT OF VETERANS AFFAIRS,	)	DATE:APR 1, 1998
Agency.	)	
	)	
	)	
	)	

Deborah J. Thomas, Baltimore, Maryland, pro se.

Edward McGarrity, Esquire, Linthicum, Maryland, for the agency.

**BEFORE**

Ben L. Erdreich, Chairman  
Beth S. Slavet, Vice Chair  
Susanne T. Marshall, Member

**OPINION AND ORDER**

The appellant has timely filed a petition for review of the initial decision issued on June 10, 1997, that dismissed her appeal for lack of jurisdiction. For the reasons set forth below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

## BACKGROUND

The appellant, a part-time, temporary Food Service Worker in the Veterans' Canteen Service, timely appealed the agency's decision to terminate her for insubordination effective January 27, 1997, and requested a hearing. *See* Initial Appeal File (IAF), Tab 1, and Tab 3, Subtabs 4A, 4B. On appeal, the appellant disputed the merits of her termination. IAF, Tabs 1, 6. She also asserted that she was a temporary employee at the time of her termination but had been employed with the agency for 2 years and 2 months, from November 14, 1994, through January 10, 1997. IAF, Tab 1, Appeal Form at 2.

In response to the appellant's petition for appeal, the agency stated and provided evidence that, pursuant to 38 U.S.C. § 7802, it appointed the appellant on September 22, 1996, to an excepted temporary appointment "not-to-exceed" (NTE) December 23, 1996, that, on December 22, 1996, it extended this appointment NTE March 22, 1997, and that it terminated the appellant for insubordination effective January 27, 1997. IAF, Tab 3, Subtabs 1, 4A-4D. In his jurisdictional show cause order, the administrative judge informed the appellant that she has the burden of proving that the Board has jurisdiction over her appeal of her termination from a temporary appointment for a period of 1 year or less and, thus, ordered the appellant to file evidence and argument that the appeal is within the Board's jurisdiction. IAF, Tab 5.

In the appellant's response to the jurisdictional show cause order, she contested the merits of her termination and claimed that her termination was discriminatory as she was actually terminated "based upon sex." IAF, Tab 6. She also alleged that, at the time of her termination, she had been employed by the agency for almost 2 years and submitted documentation showing that she had received her initial appointment with the agency on November 15, 1994. *Id.* at 7, 11, 15.

Based on the parties' written submissions, the administrative judge issued an initial decision, dismissing the appellant's appeal for lack of jurisdiction. Initial Decision (I.D.) at 1, 3. The administrative judge held that the appellant did not meet the statutory definition of an "employee" under 5 U.S.C. § 7511(a)(1)(C)(ii) entitled to appeal to the Board because, at the time of her termination, she was serving in a temporary position which lasted less than 2 years. I.D. at 2-3. Having found that the Board lacks jurisdiction over this appeal, the administrative judge found that the appellant's sex discrimination claim is not reviewable. I.D. at 2-3.

The appellant has filed a petition for review, *see* Petition for Review (PFR) File, Tab 1, to which the agency has not responded.

### ANALYSIS

In her petition for review, the appellant does not allege the existence of any new and material evidence, nor does she identify any evidence that the administrative judge overlooked or misinterpreted or any legal error by the administrative judge. We find, therefore, that the appellant has failed to establish a proper basis on which to grant her petition for review. *See* 5 C.F.R. § 1201.115.

We reopen this appeal, however, to explain the basis for our jurisdictional finding. We agree with the administrative judge that the Board lacks jurisdiction over this appeal but on different grounds than those relied on by the administrative judge. Whereas the administrative judge found that the Board lacks jurisdiction based on his finding that the appellant did not meet the statutory definition of an "employee" under 5 U.S.C. § 7511(a)(1)(C)(ii), *see* I.D. at 2-3, we find, as discussed below, that the Board lacks jurisdiction over this appeal based on the appellant's appointment under 38 U.S.C. § 7802(5).

Positions in the Veterans' Canteen Service are excluded from the appointing provisions of Title 5 by 38 U.S.C. § 7802(5). Consequently, pursuant to 5 C.F.R. § 752.401(d)(12), which provides that adverse action appeal rights are not

afforded to employees whose positions have been excluded from the appointing provisions of Title 5, the Board has no jurisdiction over the adverse action appeals of employees appointed under 38 U.S.C. § 7802(5). *Chavez v. Department of Veterans Affairs*, 65 M.S.P.R. 590, 591-94 (1994).

Here, the record shows, and the appellant does not dispute, that she was appointed on September 22, 1996, to an excepted temporary appointment NTE December 23, 1996, under 38 U.S.C. § 7802, and that, on December 22, 1996, this appointment was extended NTE March 22, 1997. *See* IAF, Tab 1, Appeal Form at 2, and Tab 3, Subtabs 1, 4A-4D; PFR File, Tab 1. As such, regardless of whether the appellant met the definition of an "employee" under 5 U.S.C. § 7511(a)(1)(C), her appeal of her termination is not within the Board's jurisdiction. *See* 38 U.S.C. § 7802(5); 5 C.F.R. § 752.401(d)(12); *Chavez*, 65 M.S.P.R. at 591-94.

Consequently, the appellant's contentions to the contrary notwithstanding, the appellant was not entitled to a hearing because she did not raise a nonfrivolous allegation of Board jurisdiction over her appeal. *See Manning v. Merit Systems Protection Board*, 742 F.2d 1424, 1427-28 (Fed. Cir. 1984) (an appellant is entitled to a hearing on the issue of Board jurisdiction over an appeal only if he raised nonfrivolous issues of fact relating to jurisdiction).

Accordingly, we affirm the initial decision as modified herein, still dismissing the appeal for lack of jurisdiction.

#### ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

#### NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has

jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

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Robert E. Taylor  
Clerk of the Board

Washington, D.C.